IMPLICATIONS OF TORT LAW ON PROFESSIONAL LIABILITY IN THE DESIGN AND CONSTRUCTION INDUSTRIES

by

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Building Construction

(ABSTRACT)

This thesis discusses the application of tort law to the design and construction industries. Basic theories of civil law, negligence, and risk management are explained relative to their influence on professional architectural liability.

Theories of negligence are examined and provide the foundation for subsequent discussions of professional liability and the variations found in recent case histories. Legal trends indicate that design professionals are held to higher standards of professional conduct than the ordinary person. Architects are also responsible to third parties as well as contractual parties. This expansion of professional duties contributes to the increase in legal claims against architects and engineers. Moreover, conventional risk management techniques do not always adequately address third party liability.

It is determined that architectural liability is strongly influenced by external factors, such as privity requirements and statutory regulations, and internal factors, such as quality control measures and
inadequate client education. Consequently, reformation efforts of these factors may be the best approach to mitigate professional liability.

Successful risk management in the future will involve avoidance, transferral, and insurance of risks.
ACKNOWLEDGEMENTS

I have always wanted to write a book. Strangely enough, this yearning has very little to do with a need to create great fiction, but has everything to do with wanting to write acknowledgements. While this thesis hardly counts as a "book" or anything remotely resembling pleasure reading, it does give me an opportunity to thank a few people for their roles in helping me reach this stage in my life.

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My cat, Simon, brought me a dead bird while I was typing a draft of this manuscript to encourage my efforts. It was a very gracious gesture and will be reciprocated with a can of salmon. So that the other animals in my life will not feel neglected should they learn to read, I want to express my gratitude to Mr. Kitty, Malcolm, Elliot and Pepper for being such wonderful companions.

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"I spent four years prostrate to the higher mind got my paper and I was free ..."

- Emily Saliers
DEDICATION

This thesis is dedicated to the memory
of my grandmother.

Louisa Williamson Bracey
April 19, 1913 - August 21, 1982

"You can do anything you want to as
long as you put your mind to it"

- Nanna
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REVIEW OF LITERATURE


Franklin, James R. "Toward A Standard of Care." Prepared with the Assistance of Victor O. Schinnerer & Co. Inc. No Date.


Chapter 1: Foundations of Law and Liability

1.1 Introduction

"Lawsuit--a case in a court of law started by one person to claim something from another; claim brought before a court of law to obtain justice."¹ Mere mention of the word "lawsuit" is often enough to make even the most seasoned architect become pale or short of breath. The practice of holding individuals accountable for their wrongdoings is as old as civilization itself. Consequently, litigation involving architects, engineers, and other design professionals, is far from new. There are, in fact, many references in the literature to ancient laws which address the issue of professional responsibility. Hummurabi, who ruled as King of Babylon over 4,000 years ago, authored a code that included the following:

If a builder has built a house for a man and has not made strong his work, and the house he built has fallen, and he has caused the death of the owner of the house, that builder shall be put to death. If he has caused the son of the owner to die, one should put to death the son of the builder.²

A later reference to an architect's standard of care was based on Roman law and was found in the Great Code of Justinian, which Napoleon eventually modified. Article 1792 of the Napoleonic version of what follows:
If a building, which an architect or other workman has undertaken to make by the job, shall fall to ruin either in whole or in part, on account of the badness of the workmanship, or even because of the badness of the soil, the architect and the undertaker shall bear the loss, if the building falls to ruin in the course of the ten years.\(^3\)

Clearly, then, professional responsibility and malpractice have long been, and continue to be, important issues in civilized societies. The litigious nature of our society has risen at an alarming rate; architects and engineers must contend with the fact that they are more vulnerable to lawsuits than ever before. Harrison Streeter recently cited statistics compiled by the Continental Casualty Company that show the frequency of claims made against architecture or engineering firms. Streeter states the following:

In 1960 there were 12.5 claims per 100 firms. By 1974 this annual rate had almost doubled, to 24.3, and during the 1980's the number has risen to about 44 claims per 100 firms.\(^4\)

It has been suggested that in the very near future, architects will stand a 90%, or greater chance of being sued during their careers.\(^5\)

While the future may seem bleak, architects must not avoid the issue of liability; rather, they must confront the issue openly and directly. Architects and engineers should not only be masters of design, but should also be acquainted with their legal rights and responsibilities.
1.2 Objectives

This thesis investigates architectural liability—from basic theories of civil law and negligence, to third-party claims, and finally to risk management. The objective is to develop a treatise on tort law as it applies to the liability of professional architects. This process will involve a review of current case law involving third-party claims based on tort, and will conclude with opinions and observations regarding these legal trends and suggestions for professional risk management techniques.

1.3 From Where Does Law Come?

Understanding how laws affect the design and construction process requires a recognition that laws stem from varied sources. Principle sources of law include federal statutes, state statutes, and common law.

Federal laws are those which are enacted by congress or are found in the United States Constitution. Federal regulations are enacted to protect the interests of all citizens—federal tax laws and social security regulations are but two examples. The construction process is rarely governed by federal statutes unless the "owner" is an entity of the federal government, such as the United States Army or the United States Post Office. In cases such as these, the parties involved would be subject to federal contract regulations.
State statutes are laws passed by state legislatures and will often directly affect the work of a design professional. These statutes represent the will of the citizens of the state. As a result, they are often enacted in an effort to protect the general welfare of the people. Professional licensing and registration and workman's compensation are examples of areas subject to state regulations. Statutory laws are also found at the local level with towns and municipalities devising ordinances to promote land-use control, construction quality, and public safety.

Common law differs from statutory law in that it is judge-made and follows precedent. It has developed over centuries from those generally accepted ideas of right and wrong which have gained judicial recognition. It is applied by state and federal courts—except when in conflict with written law. The concept of common law began in England as judges reapplied rulings from earlier cases to later ones having similar facts. The concept of *stare decisis* or "let the decision stand," is basic to common law as judges follow the precedents of early decisions and allow individuals the right to be judged as others have been. Although American judges generally follow precedent, it should be noted that common law is not a rigidly fixed body of rules. As times and circumstances change, so too does the common law. Moreover, variations in common law exist from jurisdiction to jurisdiction. Judges are bound only by decisions of higher courts within their own judicial area, but often look to other jurisdictions for guidance.
The American court system hears a multitude of cases from the local district courts to the United States Supreme Court. While cases on the docket pertain to various matters, by large and they may be defined as either criminal or civil cases. Criminal law, of course, is concerned with wrongs or offenses against public order and provides punishment for those convicted. Civil law is concerned with disputes between private parties that are not covered by criminal law. Litigation involving architectural liability is an example of a civil suit. Civil suits are usually brought under one of two theories: tort and breach of contract. Because this thesis investigates the implications of tort action, basic theories and characteristics of tort law will be discussed next.
Chapter 2: Tort Law

2.1 Introduction

Legal scholars have struggled for years to develop a precise definition for "tort." However, this struggle has resulted in definitions that are often too broad, and therefore included matters which were not torts, or definitions that are often too narrow and omitted some torts altogether. Part of the problem lies in the fact that there is not a singular law of tort, but instead, the multi-faceted laws of torts. Because of its diversity, many writers find it easier to delineate what a tort is not, rather than what it is. A tort is not a breach of contract, nor is it necessarily concerned with property rights or problems of government. One simplified definition is that a tort is a civil wrong, other than breach of contract, for which the court will provide a remedy. The law of torts is extremely broad and far-reaching; it pervades numerous classifications within the law such as property, negligence, and remedies. A common thread or underlying fabric to cases brought under tort law is that injuries or losses are to be compensated and anti-social behavior discouraged.

"Tort" is derived from the Latin tortious and means "twisted." Tortious actions are, therefore, crooked or not straight. Although tort law and criminal law have in common the regulation of human conduct, in tort action there is not necessarily state intervention in the form of
criminal prosecution. It is, basically, a private individual seeking compensation for his loss. The tort system, though essentially private, can and does run parallel to the criminal law system. For example, assault and battery is both a criminal wrong and a civil wrong. An individual may be arrested, fined and/or jailed for battering another; additionally, this person may also find himself in civil court for the damages sustained by the battered victim.

2.2 Purpose of Tort Law

It is somewhat easier to identify the function or purpose of the law of torts than it is to define it. One purpose is to keep the peace. In primitive societies, it was often necessary to compensate victims of violence to reduce the threat of tribal revenge. As societies developed and its members became willing to accept restitution, the early tort system provided a mechanism for reducing the threat of violence and deter unacceptable behavior. Since the law of torts covers such broad territory, a single guiding principle for conduct and compensation is difficult to find. Central to the theme of all torts is the idea of unreasonable interference with the interests of others. From that, it can be said that the purpose of the tort system is to adjust the losses of injured parties and to afford compensation for those injuries sustained by one person as a result of the improper conduct of another. Difficulty often lies in the determination of what constitutes
unreasonable or tortious behavior. The basic reason for this difficulty is that what seems reasonable to some, may seem completely unreasonable to others. The court system must weigh the interests of the individual against an objective social standard, while simultaneously considering the social consequences of the individual's actions. The goal becomes striking a balance between a plaintiff's claim for protection against damages, and the defendant's claim to individual freedom.\textsuperscript{10}

As previously mentioned, tort law covers a range of interests as well as a range of personal conduct. Justin Sweet describes a classification system ranking the interests requiring protection, and the conduct of the person causing the loss. The first of these concepts concerns the interests considered important enough to require tort protection and are:

\begin{itemize}
\item[(1)] personal—sometimes defined to include psychological or emotional interests
\item[(2)] property—tangible and intangible
\item[(3)] economic—unconnected to harm to a person or damage to property
\end{itemize}

The conduct of the tort-feasor, or wrong-doer, is next considered:

\begin{itemize}
\item[(1)] intentional—including not only the desire to cause harm, but the realization that the conduct will almost certainly cause harm.
\item[(2)] negligent—usually defined as the failure to live up to the standard prescribed by law.
\item[(3)] non-culpable—though in a sense wrongful, the actor neither intends harm, nor is negligent.\textsuperscript{11}
\end{itemize}
These tripartite classifications play roles in the determination of who receives compensation from the person causing the loss. From the first group, harm to a person is considered most deserving of protection, with harm to property being second. When considering conduct, intentional actions are thought to be least deserving of protection, followed by negligent behavior. It should be remembered that these classifications are not rigid; as with tort law in general, they are flexible and subject to subtle distinctions.

2.3 Factors Affecting Tort Liability

Tort liability is affected by numerous factors. One of the most important factors is the concept of precedent—judicial decisions made under similar circumstances. As previously mentioned, tort law is shaped by current social customs or trends. It is, therefore, interesting to note that future judicial decisions may be strongly influenced by precedents reflective of current social, economic, and political attitudes.

The issue of morality is also cited as a factor affecting tort liability. Throughout time, societies has labeled certain acts as either morally "right" or morally "wrong," and such public opinion guided court decisions. Consequently, the person who behaved "immorally" was punished by the courts. Later, there began a shift in legal thinking which downplayed the somewhat changeable notions of morality and introduced the
aspect of "fault" as necessary for liability to exist. The law disfavors individuals who do not, for whatever reason, live up to a certain standard of conduct. These acts may be completely moral or normal within the community, but have, nonetheless, caused someone to suffer a loss.

Toward the end of the nineteenth century, a great emphasis was placed on establishing fault and personal blame, rather than subjecting one's morality to measurement. However, throughout the twentieth century the definition of "fault" has had less to do with personal blame, and more to do with a departure from expected social conduct for the protection of others.\textsuperscript{12} It remains true that tort liability often rests upon some moral delinquency, but this delinquency is founded more on a consideration of public policy and welfare, as opposed to private morals.

A final factor to consider is the two-fold objective of punishment and prevention. Objectives in tort law are often stated in terms of compensating the victims, but prevention of future offenses is equally important. One reason for imposing liability is to provide the wrong-doer with an incentive for preventing future occurrences of harmful or damaging behavior.

As can be seen, tort law concerns itself with various wrongs and losses suffered by individuals and provides for compensation. Negligence is a form of a tort that will now be discussed in greater detail.
Chapter 3: Negligence

3.1 Introduction to Negligence

As defined in Black's law Dictionary, "negligence" is "The omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do, or the doing of something which a reasonable and prudent man would not do." The concepts of fault and carelessness can be traced back in law for hundreds of years, but negligence became recognized as a separate tort during the first half of the nineteenth century. Until that time, negligence was viewed as simply one of the many ways to commit a tort. Early appearances of what is now known as negligence were seen in the liability attached to certain professions or trades. Individuals such as surgeons, blacksmiths, carriers, or innkeepers, who had specialized skills, became liable for any negligent conduct.

The rise of the theory of negligence as a separate and independent basis for tort liability coincided with the Industrial Revolution. This increase in recognition was probably stimulated by the increase in the number of industrial accidents caused by machinery. As society became more and more mechanized, and older causes of action disappeared or lost support, negligence developed into the dominant cause of action for accidental injuries; Today, the negligence concept governs not only accidental injuries, but also losses caused by automobile accidents, and
losses caused by a landowner failing to maintain safe property. This thesis will be concerned with the losses caused by the negligent acts of professionals.

3.2 Elements of Negligence

Before legal action based upon negligence may be initiated, certain requirements must first be met. Those requirements referred to as the elements of negligence are:

(1) Duty—an obligation, recognized by the law, requiring the person to conform to a certain standard of conduct, for the protection of others against unreasonable risks, for without the existence of such a relationship, there can be no liability for negligence.

(2) Standard of Care—the measure by which behavior is judged in determining legal duties and rights,

(3) Proximate Cause—a reasonably close causal connection between the conduct and resulting injury or loss, and

(4) Actual Loss—injury to the person, his property, or his rights through the unlawful or negligent act of another, often measured in terms of money.14

An example of negligence can be seen in the following scenario: a designer is retained to design a shopping mall. This mall is to have several elevated walkways spanning an atrium. The designer is confronted with several duties: a duty to the owner to design a suitable structure, a duty to the contractor to provide complete plans and specifications, and duties to the future tenants and patrons of the mall to provide a safe place to work and shop. If the designer fails to consider the
expected loading on the walkways and consequently designs an inadequate structure, he has breached the professional standard of care. Failure to consider expected loading conditions is not what the reasonable, prudent architect or engineer would do. Needless to say, if the walkways collapse due to inadequate design, the designer may be liable for the damages and could be said to have been negligent.

3.2.1 Duty

Each element of negligence must be established before the plaintiff will have the necessary legal standing to succeed against another in a claim for negligence. As the foundation for each successive element, the importance of "duty" cannot be overemphasized. In English law, a "duty" was not always necessary for imposing liability; liability was imposed even without establishment of personal fault. This approach is now considered too broad for ordinary negligence cases and legal scholars have attempted to define the scope of a "duty." Defined simply, a duty is an obligation to act responsibly and in such a manner so as to protect others from unreasonable risks or harm. Foreseeability is vital to the determination of the existence of a duty. Foreseeability is the knowing, or the expectation that one's actions might possibly cause injury or loss to others. For example, it is foreseeable that to throw a brick into a crowd of people may result in an injury. Thus, in answering the question "To whom do I owe a duty?" One possible answer is to
...persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question.\textsuperscript{15}

A defendant may have breached his standard of care which proximately or legally caused a loss to occur, but can be not guilty of negligence because no duty was owed to the plaintiff. Successful plaintiffs in a negligence claim must have been "foreseeable plaintiffs" or within a general danger zone of the negligent activity. An example, though possible extreme, follows: a golfer has just teed off and his ball somehow manages to hit a duck that has just flown up from the water hazard. The duck spins in the air and falls toward the ground. Unfortunately, the duck lands on the arms of another golfer who is driving his golfcart on a bridge spanning the water hazard. The fallen duck so distracts and shocks the golfer that he drives his cart into the water and suffers various losses. The golfer who hit the ball should not be liable for the second golfer's losses because there was no duty between the two, and the second golfer was not a foreseeable plaintiff.

Architects and engineers may owe a duty to third-parties such as contractors, sub-contractors, and private citizens using the facility. The rising trend of third-party claims against design professionals will be discussed at a later point.
3.2.2 Standard of Care

Once it is established that a duty exists, the loss-causing action must be measured against some standard. It is not satisfactory for someone to say he has done his best; the entire theory of negligence rests upon some uniform standard of behavior. This standard must be objective, and as far as possible, the same for all persons. At the same time, it must make allowances for the risks known to the person committing the act and the circumstances surrounding the action. The courts have dealt with this complex problem by developing the fictitious entity known as the "reasonable man." This creature of the courts is a personification of the community ideal of reasonable behavior. As to attributes, the reasonable man is sufficiently intelligent to live in a community and conform to its standards, and possesses the same physical characteristics as the alleged wrongdoer. As a result, the wrongdoer is never confronted with standards he could never attain--a blind man, for example, is compared to a blind reasonable man and not a sighted ideal. It must be remembered that the conduct of the reasonable man will vary as circumstances vary; negligence is the failure to do what the reasonable person would do in the same or similar circumstances.

The standards of required conduct are the minimum standards below which the person will not be permitted to fall. If an individual possesses knowledge, skill, or intelligence superior to that of the average person, he or she will be held to a standard commensurate with
that knowledge. Professionals, such as architects and engineers, are held to a higher standard of care when rendering services requiring such skills or knowledge. Moreover, they are not only expected to exercise reasonable care when working, but to maintain a minimum standard of special knowledge and ability.\(^{16}\) In determining appropriate standards of care for professionals, questions may arise concerning the professional services rendered—such as full versus partial services, or services outside the normal scope of work. An architect's basic services, as stated in the AIA B-141 document, include: schematic design, design development, construction documents, bidding/negotiation, and contract administration.\(^{17}\) Does the professional standard of care change as the services increases or decrease in scope? A Louisiana Court of Appeals addressed this issue in *Weill Construction Co. v. Thibodeaux*.\(^{18}\) In this case, an architectural firm was relieved of liability for water damage to a skating rink it had contracted to design, but not supervise during construction. Although no written contract existed between the architect and the owner, the architect agreed to provide a design for 5% of the construction costs. The architect further agreed to periodically visit the site, not in a supervisory capacity, but solely to determine payments due the contractor. The court determined that architects incur liability only when their plans and specifications are defective as the result of negligence in exercising reasonable care and skill. The court further noted that the owner failed to prove the architect had not performed to the same standards expected of other design professionals. In this case,
the architect was not liable for damages when rendering partial services, but this may not always be the case in every jurisdiction. Byron D. Berg and Arthur F. O'Leary suggest that when an architect agrees to furnish design and construction document preparation services only, his exposure to liability increases tremendously during the construction period--particularly since the architect is not observing the work. They further state:

In the event an architect agrees to render incomplete services during the construction period, he should first obtain from his client a written waiver of liability as a trade-off for the reduced professional fee expense. If the client is reluctant to waive or limit the architect's liability in such circumstances, the architect should be wary of proceeding. 19

If a design professional contemplates engaging in partial services, it would be advisable for him to first consult an attorney to determine what the laws are in that state relative to partial services and liability. Moreover, since insurers prefer to insure only those services normally provided by design professionals, it would also be wise for the professional to ascertain the extent of his coverage.

Thus, for architects and engineers, the comparative standard of care transcends that of the reasonable man, and is compared to what other prudent designers would do in similar circumstances; breach of this standard could be grounds for negligence.
Professional responsibility, or liability, is affected by numerous factors such as expert testimony or privity requirements, and will be examined next.
Chapter 4: Professional Liability

4.1 Introduction

Earlier discussions in this manuscript about the sources of law, characteristics and functions of tort law, and the theory of negligence, have supplied the framework for the topic at hand which is professional liability. The boundaries of professional liability have expanded tremendously during the past thirty years. This expansion has manifested itself in an increase in claims against architects and engineers. Reasons for this expansion of liability include easier access to the legal system, the emphasis on compensating victims in tort cases, the proliferation of building and housing codes, and societal changes--specifically the fact that Americans are much less likely to accept grievances silently and will seek redress through legal action.20

4.2 What is Professional Liability?

Professional liability is determined by state law; depending on various factors, the liability rules will be those where the architect has his place of business, where the design is created, or where the project is located.21 As mentioned earlier, the courts are most likely to protect claims based upon personal injury or harm, rather than claims based on property or economic loss. Claims against architects can, and
have, been based on assorted losses and perceived shortcomings. The success of these claims is determined by the particular facts of the case and the laws of the state. Examples of claims brought against architects of which many were successful are:

(1) Specifying material that did not comply with building codes.²²

(2) Failure to warn client of potential risks when using certain materials.²³

(3) Designing a building that could not be built by local tradesmen.²⁴

(4) Issuing payments or certificates negligently, and²⁵

(5) Failure to observe design deviations when checking shop drawings.²⁶

Litigants initiating a claim against an architect will often attempt to show that the professional somehow breached some standard of care. A "standard of care" is an element of negligence; furthermore, when judging an individual's action, the courts impose the criteria of the "reasonable man." What, then, is considered a professional standard of care? James R. Franklin, FAIA, examines this issue with the assistance of the Victor O. Schinnerer & Co., Inc., a major insurer of designers, in the monograph "Toward a Standard of Care."²⁷ Professionals owe their clients and the public at least three types of services on a project--contractual obligations, regulatory obligations (e.g. codes, licensing laws, zoning regulations), and a professional standard of care.

The concept of standard of care, like many of our laws, is derived from old English law; the concept never changes, but determinations of
what is or is not acceptable under the law is subject to change and
reinterpretation as society changes. Franklin states.

...the law says only that a design professional is
required to exercise a degree of care, skill, and
diligence in professional practices that is equivalent
to what may be reasonably required of one in that
profession given the specific time, place, and
circumstances.28

4.3 Expert Testimony

One means of establishing the professional standard is through the
use of expert testimony. The construction process is both complex and
highly specialized. Decisions within the judicial system are made by
judges and juries who typically have little, if any, knowledge regarding
design or construction. As a result, expert witnesses are employed to
explain technical matters and give opinions regarding the industry
standards to the court. The expert's opinion is based on first-hand
evidence or, if that is not possible, questions stemming from
hypothetical situations based on the facts of the case. Whether or not
an individual is qualified to testify as an expert is determined by the
trial judge. The trial judge will usually base a decision on the
prospective witness' education, work experience, professional
registration, research, writings etc.29 It is important to bear in mind
as the design profession and industry increases in technology and
specialization, the role of the expert witness will continue to be an
important component in professional liability litigation, for it is often their function to define the standard of care.

4.4 Third-Party Claims and Privity

A subcategory of professional liability which is currently receiving a great deal of attention and one which may prove to have the greatest impact on the design industry is that of third-party claims against design professionals. It is commonly, but mistakenly, thought that the legal duties of the architect extend only to the individuals with whom they deal directly. Legal responsibilities can link the architect to many other people, some of whom he has never seen, met, or even knew existed. These people are referred to as third-parties and may be the contractors, sub-contractors, construction workers, adjacent landowners, future tenants and pedestrians. As Justin Sweet states, "The proliferation of third-party claims has generated more litigation, varying state rules, and judicial opinions of divided courts than have claims by clients against design professionals."³⁰

Central to the issue of third-party litigation is the concept of privity. Privity is the mutual or successive relationship to the rights of property; privity of contract describes the connection between contracting parties. Being in privity with someone simply means two parties have entered into a legal contract. In the past, architects and engineers entered into contractual relationships with clients to whom
they then owned legal duties. Individuals not in privity with the
designer could not assert claims for their losses. The history of
privity is long and replete with modifications and changes, but it
suffices to say that privity rarely applies in professional liability
except in some jurisdictions.

4.5 Contract v. Tort

Third-party claims against architects are based on one of two
theories: contract or tort. While this thesis investigates the
implications of tort action, brief mention should be made of contract
theory and how it differs from tort. A claim based on contract theory
must be supported by an allegation that the plaintiff was the intended
beneficiary of the contract. In other words, a contract is an
agreement between two or more persons, creating legal rights and duties
that something shall, or shall not, be done. If one of the parties
defaults or fails to fulfill this legal duty, the other party, not being
benefitted, may initiate legal action. The contractual relationship
between designer and client, as well as the relationship between client
and contractor, can have considerable impact on the architect's legal
duties. These relationships can strongly influence the definition and
limitations of the professional's scope of responsibilities. Failure to
perform these duties can constitute contract breach which often results
in money damages paid to the owner or a deprivation of the architect's
fee. Another potential danger is that certain terms in the contract may serve to raise the architect's standard of care, such as when the designer promises a certain result.

Although breach of contract claims are only enforceable by the parties in privity, some rights can be established by a "third-party beneficiary." A third-party beneficiary is "one whom the parties to the contract seek to benefit by their performance." In other words, courts sometimes permit action between two parties if they have a joint common contracting party, but intent to establish this relationship must be shown by the involved parties. For example, a contractor may claim to be a third-party beneficiary of the contract between the owner and the architect. If a breach of contract occurs by the architect and results in damages to the contractor, the contractor may seek action against the architect for those damages. The courts determine the status of an individual, that is, whether or not he is an intended beneficiary, by careful examination of the contract and the intent of the contracting parties.

However, third-party beneficiary claims are largely unsuccessful in court. This is due to judges' frequent findings that third-parties are "incidental beneficiaries" rather than "intended beneficiaries." Incidental beneficiaries are parties that are benefitted by an agreement, or a contract, between other parties, but this benefit is not the specific intent of the contractual performance. Moreover, incidental beneficiaries have no legal standing to enforce a contract between other
As a result, contractors and other third-parties are more likely to recover damages in claims based on tort rather than trying to assert third-party beneficiary rights.

The design professional should see to careful drafting of the contract in order to avoid possible claims by alleged third-party beneficiaries. It should be remembered, though, that careful contract preparation does not always provide the architect with a citadel against litigation. The plaintiff can very often use the same proof of facts to establish either a tort or a contract claim. Basic differences between tort and contract claims are that in contract claims the duty is owed to the other contracting party or intended beneficiary, whereas a tort claim results from broader exposure to liability because of multiple duties to others outside the contract. Another feature distinguishing contract from tort is that in contract claims demonstration of negligence is not necessary.

Third-parties may successfully initiate legal action against design professionals based on tort. Claimants involved in an action against an architect or engineer will usually allege the designer was negligent in some aspect of his work. As mentioned, a successful claim against a professional for negligence will depend on the establishment of a duty, a breach in the standard of care, and a resulting injury or loss. The concept of privity once provided architects with a seemingly impenetrable shield against such claims. Current legal thought suggests that if an individual can show cause and effect with respect to
a professional's actions and the resulting loss, the aggrieved party will be given the opportunity to seek legal redress. The relative success of third-party tort claims rests on the fact that today judges and juries find architects owe duties of care will beyond those established by contract. An important issue to bear in mind is that of reasonable foreseeability--it must be foreseeable that the activity may cause harm to persons or property.

Most negligence cases spring from either personal harm or from economic loss. The disintegration of the privity requirement in cases of personal harm occurred in the early 1900's. Again, this was largely due to the Industrial Revolution and increased mechanization. Manufacturers were faced with a shift from negligence to strict liability--or liability without fault. Courts have been quick to use tort law to protect individuals from personal harm and property damages. Consequently, architects often find themselves to be "sitting ducks" for suits from injured construction workers and pedestrians, or disgruntled landowners. A growing trend, which could mean financial disaster or ruin, is that of the design professional's liability for economic loss by third-parties involved in the construction process. As Michael S. Simon states in Construction Claims and Liability, "The old (and still majority) belief is that in order to recover damages in tort there must first be an initial injury to one's person or property." It was felt that claims for pure economic loss, absent personal or property loss, were best based on contract theory instead of tort. With the steady
erosion of privity as a defense, there has been increased support for liability of the design professional for economic losses as a result of tort. It is well established that negligent preparation of plans and specification,\textsuperscript{39} delays in making corrections to plans,\textsuperscript{40} and improper construction supervision\textsuperscript{41} can lead to devastating economic losses for contractors. To allow an architect to be shielded from liability, even though they acted negligently, lacks foundation and undermines the concept of justice. As Simon further states, "...the only way to achieve equity will be by holding the party that committed the wrong liable for its wrong and resulting damages."\textsuperscript{42} Though it remains true that privity as a defense in tort actions is practically non-existent, some states still require privity to exist before a claim for economic loss can be sustained.\textsuperscript{43}

The liability of architects and engineers to third-parties may be directly affected by the services the professional provides. When assessing liability, the responsibilities need to be identified and analyzed. In Avoiding Liability in Architecture, Design, and Construction (Robert Cushman, Ed.), architects are identified as having three basic responsibilities to their client:

(1) acting as an independent contractor in the preparation of plans and specifications

(2) acting as the agent of the owner in the contract administration aspect of the work, and

(3) acting as a quasi-arbitrator in interpreting the contract requirements, in judging the performance of the owner or contractor pursuant to the terms of the contract, and in resolving
disputes referred to him under the contract provisions \(^{44}\)

With each of these roles comes varying degrees of professional liability. Acting as an independent contractor exposes the designer to the most liability. An independent contractor acts for his own benefit—the employer has no control over the manner in which the work is to be done. As such, it is the independent contractor who is charged with the responsibility of assuming possible risks.\(^{45}\) The owner usually does not have the expertise to develop building plans and specifications; accordingly, this job is delegated to a professional who, by virtue of his advanced skills and expertise, incurs a degree of liability. The role of an agent or an owner's representative is a bit different. Technically, an "agent" is one who "acts for a disclosed principal and does not accept independent breach of contract liability."\(^{46}\) A major component of the agent-principal relationship is vicarious liability. Vicarious liability is the liability imposed on one person for the tort committed by another, even though the first person is innocent of tortious conduct. In this relationship, the principal or owner, "...is liable for torts committed by an agent acting within the scope of his activities as an agent."\(^{47}\) This relationship does not shield the architect from all liability however. It would appear that a third-party claim against an "agent" would depend on the specific responsibilities and authority delegated to the designer as work supervisor, inspector, or observer. Often these roles are limited in capacity in order to reduce
liability. The architect does remain fully liable to the owner for any deficiencies or negligent acts performed while inspecting the construction work. Traditionally, an architect is only granted immunity from liability when acting as a quasi-arbitrator or contract interpreter— the prerequisite for this immunity is the architect acting in good faith.48

The material reviewed thus far has pertained to theories and features of tort law and negligence. This material may now be brought into sharper focus by a discussion of recent case histories.
Chapter 5: Case Studies

5.1 Introduction

Research and study on a facet of law relative to a specific profession or occupation can be facilitated by the analysis of case studies. Decisions in law depend on the nuances as well as facts of the different cases presented to the judiciary. This investigation has yielded a sampling of recent third-party claims against design professionals. While all are based on tort, decisions are not uniform. These case studies provide a spring-board from which discussion will follow regarding legal trends, professional responsibilities, and risk management.

5.2 Case 1:

M.J. Womack, Inc. v. House of Representatives
509 So.2d. 62
(La. App. 1 Cir. 1987)

In this case, a contractor sought damages for the economic losses he sustained as a result of the architect’s negligence.

The state of Louisiana hired the plaintiff, M.J. Womack - a general contractor, to renovate parts of the Capitol Building according to the plans prepared by the architect. The agreement stipulated that the plaintiff would receive a bonus for early completion. The work was to be
completed by March 15, 1982; for each day the project was done
beforehand, the plaintiff would receive $5,000 per day as a bonus not to
exceed $100,000. The contract also stated that the date for this bonus
payment would not be changed from March 15 for any reason. As the
renovation was proceeding, workers discovered a metal X-brace within an
interior wall that was not shown on the plans or the specifications, but
which would require removal in order to conform to the original design
concept. Because the brace was part of the wind-bracing system, it could
not be removed, and the architect was required to redesign the plans.
Finally, new plans were accepted and work resumed. The renovation was
completed on April 15. Womack alleged that he could have finished in
time to receive his full bonus and that his economic loss was a direct
result of the architect’s failure to discover the presence of the X-brace
and design accordingly. As a result, the plaintiff brought action to
recover damages from the State under contract and the architect under a
tort theory.

The trial court first heard the case and decided in favor of the
defendant House Representatives and architect. Upon appeal, the Court
believed the lower court erred in finding the architect not liable for
the preparation of defective plans. The architect maintained it was not
his duty to provide perfect plans, but to exercise the standard of care
other design professionals would in the same situation. Moreover, the
architect claimed that in order to establish this standard, expert
testimony would be required. The court did not agree, however. The
court reasoned that when lay persons could infer negligence by using common sense standards, expert testimony was not required.

A vice-president for the defendant's architecture firm testified that he had also encountered some X-bracing when working on an earlier project in the Capitol building. The framing plans used at that time did not show the braces, though. But, the original building plans, located in the archives, did show the braces throughout the building. The architect then alleged it would have taken "days" for someone to locate these specific plans, but testimony revealed it only took someone 30 minutes to one hour to find the necessary drawings.

While it is accepted that the architect did not have to render "perfect" plans, he nevertheless fell below his professional standard of care to take reasonable steps to determine the location of structural elements with the building. The architect owed the contractor a duty to prepare plans on which the contractor could bid and do his work. This duty was breached, the standard of care was not met, and the contractor incurred damages as a result. Accordingly, the architect was found negligent.

The court could not impose liability on the House of Representatives for merely hiring the architect, who acted as an independent contractor and therefore incurred all of the liability. The court also found that if the architect had discovered the bracing system and designed accordingly, the plaintiff would have finished the work early and received the bonus. As a result, judgement was rendered in favor of the
contractor against the architect for $100,000 plus interest.

5.3 Case 2:

Prichard Bros., Inc. v. The Grady Company

436 N.W.2d 460

(Minn. App. 1989)

This Minnesota case, which was decided in 1989, addressed professional negligence and resulting damages. In 1980, the Independent School District contracted with the architect, Grady, to provide services for the addition and renovation of a school building. The School District and architect executed a standard AIA contract, incorporating the general conditions document. In June of 1981 the School District accepted a bid from the contractor, Prichard Bros. Construction began immediately and was scheduled to be complete in May or June of 1982. A number of delays caused the construction not to be finished until October of 1982. Due to the delays, the plaintiff, Prichard Bros., alleged damages and sought to recover increased costs and lost earnings. The School District was also brought into the suit on vicarious liability charges because of the architect's role as agent.

The contractor alleged that the architect was negligent in his interpretations of the plans and in his response to shop drawings. Grady rejected a number of shop drawings which the plaintiff claims were proper and should have been accepted. These rejections ultimately caused the
entire project to run behind schedule. Testimony by an expert witness confirmed the plaintiff's assertion that the shop drawings were proper and acceptable. Other witnesses testified that Grady was often uncooperative and this behavior, coupled with the shop drawing rejections, unduly delayed the project. After reviewing the evidence, the court determined the architect was indeed negligent and that this negligence proximately caused the work delays and the contractor's resulting losses.

Upon review of the contract between the owner, School District, and the architect, Grady, it was determined that the architect did not act as an agent of the owner at all times during the construction phase. Because Grady acted independently in his interpretation of contract documents and when responding to shop drawings, the School district could not be held vicariously liable. The claims against the owner were dismissed.

Testimony revealed the damages sought were the expenses actually incurred as a result of the work delays. The total-cost method, or the reasonable value of the work done, including actual costs, overhead, and profits, was deemed the correct method of award assessment. Consequently, judgement was entered in favor of Prichard Bros. in the amount of $92,859 plus interest against the architect.

5.4 Case 3:

Sensenbrenner v. Rust, Orling & Neale

374 S.E. 2d. 55 (Va. 1988)
This 1988 decision dealt with a third-party claim against an architect and a pool installer for damages to the indoor swimming pool and house foundation as a result of the architect's negligence.

On October 3, 1989 the plaintiffs (Sensenbrenners) contracted with O'Hara and Co. Inc. to construct a new home for them. The house was to include an enclosed swimming pool. O'Hara contracted with the architect, Rust, Orling & Neale to design the home, the pool, and its enclosure. After the architect completed the necessary plans, O'Hara subcontracted the pool construction to KDI Sylvan Pools, Inc. This work was done during the summer of 1985; O'Hara conveyed the property to the owners on August 15, 1985.

The plaintiffs alleged that due to negligent design and supervision by the architect and negligent construction by the pool contractor, the pool, which was built on uncompacted rather than natural soils, settled causing damage to the pool and the house foundation. This damage was in the form of cracked foundations, to both the pool and the house, as a result of water effusion from broken pipes.

After filing this claim, the defendants stated that the plaintiffs were only seeking damages for economic loss for which there is no recovery in tort in absence of privity. The plaintiffs contended that their claim was for property damage; under Virginia law, the defense of privity had been abolished when the damages sought were for personal injuries, wrongful death or property damage as a result of negligence. They further argues that they were not seeking to recover for the loss of
the use of the pool, but rather, to recover for the cost of repairing the
damage done to their property.

Upon review of the facts, the court stated that tort law was not
designed to compensate parties who had suffered losses from a breach of
an agreement. Underlying considerations in tort law are the safety of
persons and property, whereas the foundation of contract law is
protection of expectations bargained for. It was reasoned that in this
case, the Sensenbrenners had claimed nothing more than disappointed
economic expectations. They contracted for a package which was to
include land, design of a home and pool, and construction of this home
and pool. The package was alleged to be defective and this resulting
deficiency caused damage to the whole. As a result, the plaintiff's loss
was purely economic. Recovery in tort is available only when there is a
breach of duty to take care of the safety of the persons or property of
another. The court found the architect and the pool contractor did not
owe such a duty to the plaintiffs. Accordingly, the decision was
rendered in favor of the architect and pool contractor.

5.5 Case 4:

Widett v. U.S. Fidelity and Guaranty Company

815 F. 2d. 885 (2nd Cir. 1987)

In this diversity action, a subcontractor on a county park project
brought action against an architectural firm for negligent preparation of
plans and specifications. This alleged negligence resulted in losses sustained by the subcontractor in the amount of $105,000.

In 1981, Monroe County, New York contracted with the architectural firm Reimann-Beuchner (R-B) for the plans and specifications to be used in the construction of Greece Canal Park. The architects were to conduct casual inspections of the construction work to ensure compliance with their design, but the County retained primary responsibility for site supervision. R-B based its first set of plans on topographical information supplied by the County. Upon completion of the plans, the County entered into a general construction contract with R.W. Scaccia & Sons Contractors, Inc. (Scaccia), who in turn signed a subcontract with B.W. Construction Co., (B.W.) to perform the grading work required by the site plans. The subcontract stipulated that no additional work was to be performed except under written change order from Scaccia. Moreover, the subcontract also stated that all necessary "fill" material would be available on the site.

B.W. surveyed the project site and discovered that elevations appearing on the architect's site plans were one to one and one-half feet higher than the elevation's obtained from B.W.'s survey. B.W. then indicated to the general contractor and the County that additional fill would be required to correct the error. The County requested that the architects, R-B, revise the grading plans, which they did. As work continued, it became evident that the necessary fill could not be obtained from the "cuts" specified in the revised set of plans. The
subcontractor requested a change order permitting him to transport additional fill to the job site at the County's expense. This request was denied, and the subcontractor was warned it would be ordered off the job unless it complied with the subcontract. B.W. chose to work under protest and hauled additional fill at its own expense. The subcontractor left the site after the general contractor's bankruptcy and brought this action to recover the increased costs it incurred in completing the project.

The subcontractor, B.W., alleged that the architectural firm R-B was liable in negligence for its preparation of an erroneous site plan. B.W. relied on this site plan and incurred economic losses because of its inadequacy. The court found, however, that in New York professionals are not liable either in tort or in contract absent privity. Moreover, it was also clear that no contractual relationship existed between B.W. and R-B. The subcontractor contracted only with the general contractor; the architect contracted with the owner— in neither case was a sufficient nexus found between the subcontractor and the architect that could serve as a substitute for contractual privity. Because privity of contract remains a requirement in New York to establish negligence against an architect and because such privity lacked in this case, the subcontractor's complaint was dismissed.
5.6 Case 5:

Stewart v. Schmieder

386 So.2d. 1351 (La. 1980)

This was a case consisting of five suits brought against the City of Baton Rouge and the Parish of East Baton Rouge following the collapse of a building under construction which killed three workers and injured two others. The owner of the building, Schmieder, and the architect were also sued.

The owner contracted with the architect to draw plans and specifications of a building he wanted to construct. The Baton Rouge building codes required that plans and specifications be drawn by a registered architect or engineer and submitted to the Building Inspector to receive a building permit. The architect had completed five sheets of drawings when he was instructed to stop work and submit them to the Building Inspector. The plans were initially rejected, but later a permit was issued, marked "shell only" despite their being incomplete.

During construction, the architect visited the site and noticed several deviations from his incomplete plans and notified the owner. The City-Parish also inspected the building, found several mistakes and wrote the architect informing him a certificate of occupancy would be denied until the problems were corrected.

Later, when the architect visited the site, he believed the problems to have been corrected and reported this to the City-Parish. Five days later, the building collapsed. Experts stated the collapse was due to a
shear failure in the concrete roof where it was joined to the wall. The failure was due to faulty design which allowed insufficient support for the roof and failed to consider the shrinkage of the cured concrete.

Testimony revealed that the building inspector had the specific duty to require completed plans and specifications submitted by an architect or engineer before issuing building permits. He was to ascertain that the plans complied with the building codes and that the proposed construction was safe. Moreover, experts said the design flaw was of such an obvious nature that any competent engineer could have detected it from the incomplete plans.

The court found that the City-Parish, and its agent building inspector, had a special duty to the construction workers to protect them from unnecessarily risky buildings. It further found the City-Parish breached this duty and was responsible for the losses sustained by the plaintiffs. The building inspectors negligently examined proposed building plans and improperly issued a building permit despite serious design defects. The municipality was not protected from liability from the "public duty" doctrine which bars claims against a municipality when there is a duty, but the duty is to the general public, and not a few individuals.

Accordingly, the City-Parish was found to have been negligent and responsible for the damages. The architect had been found negligent by a lower court, but the owner decided to settle out of court with the plaintiffs. Judgments were entered in favor of the plaintiffs in excess
of $750,000 against the City-Parish and the architect.

As stated, these cases are illustrative of recent third party claims against architects and of the varying decisions reached by courts. While any decision in a court of law will depend upon the particular facts, it can be said that claims involving a design professional will be contingent upon the architect's approach to risk management which will now be discussed.
Chapter 6: Risk Management

6.1 Introduction

It is clear that architects and engineers, by the very nature of their profession and the services they provide, are extremely vulnerable to lawsuits. The abandonment of the privity requirement and the perceived expansion of duties owed to others has undoubtedly resulted in the tremendous surge of litigation against design professionals. This surge of litigation has also contributed heavily to the collapse of insurance industry capacities. Ava J. Abramowitz, Deputy General Counsel for the AIA, reports in his monograph "Professional Liability From the Architect's Perspective", "between 1984 and '85, the number of companies offering design professional liability coverage nationwide shrank from 13 to two."49

During this time of skyrocketing insurance premiums for the same or less coverage and seemingly unrestricted paths to lawsuits what protection is available to architects? James R. Franklin and the Schinnerer Co. identify three important elements of risk management: 1) risk assessment, 2) risk allocation, and 3) documentation.50

6.2 Risk Assessment

Risk assessment involves recognizing potential or anticipated risks
and should be initiated at the beginning of each project and updated periodically throughout the project's life. This assessment can be extremely important when directed at the client and the project itself. The architect should make attempts to ascertain the adequacy of the client's financial resources relative to the expected expense of the project. While finances can seem very private subject matter, the AIA, nonetheless, empowers the architect to request information on the owner's financial resources at any time during their performance. AIA document B141 section 4.3 specifically states:

If requested by the Architect, the Owner shall furnish evidence that financial arrangements have been made to fulfill the Owner's obligations under this Agreement.51

Knowing this information could prevent costly contract payouts or legal fees, especially when the client is relatively inexperienced or knows very little of the world of construction and of the uncertainties and adjustments often required.

Additionally, the project itself should be evaluated in terms of its potential risks. A project calling for new materials, untested equipment, or new construction techniques may be viewed as creating special risk potential and should therefore be viewed as creating special risk potential. These risks must be weighed against the benefits of undertaking such a project.

Allocation of risks to the involved party should be done in a fair and judicious manner. According to the AIA, the intent of the AIA's
standard contract forms is to allocate risks to the individual who has
the best capacity to provide a solution to the problem and the authority
to do so. The contract should make very clear the scope of services
expected of the designer, what his basic services are, and what
constitutes additional services. Trouble often arises when an architect
exceeds his authority—especially on the construction site when the
architect acts as a supervisor not only to insure the integrity of his
design concept but also to direct the means and methods. This stretching
of authority place the designer in the uncomfortable position of assuming
the risks of the construction and likewise raises his standard of care.

Documentation is the most basic of risk management techniques, but
it is also the technique most frequently neglected despite its
importance. More often than not, the determination of a design
professional's liability or damages will be based upon their project
documentation. Physical evidence of actions taken or decisions made
during the design and construction process will be much more influential
during negotiation or litigation than the selective memories of the
involved parties. Many architects consider record keeping to be
prohibitively time consuming and wearisome, but evidence of records
covering various aspects of a project can mean the difference between
paying and receiving damages.

It is extremely important that project documentation be of such a
nature that it will be admissible in court as evidence. While each
jurisdiction has its own rules regarding evidence, most courts permit the
use of records of regularly conducted business activity, as long as they relate to the facts at issue. Michael S. Simon observes that the documentation should include any "...letters, agreements, reports, or records which are produced for business purposes at the time the event occurs by a person with knowledge [of the project]." Examples of what should be maintained in records include: written and signed memoranda of agreements made between the architect and the owner, memoranda of telephone conversations, letters, drawings, test measurements or results, and perhaps most important—a daily logbook. The project logbook should be used to note work progress, any unsatisfactory conditions, change orders, and any other detail which might become a point of dispute. The design professional should make every attempt to put in writing the outcomes of any meetings, conferences, telephone conversations, or other correspondence between himself and the other parties. Additionally, this correspondence should be dated and copies sent via certified or registered mail to the appropriate party to ascertain mutual understanding on certain issues. This can indicate a "meeting of the minds" and a design professional not exceeding his authority on a project.

There is obviously no standard or perfect method of documentation, but each architect should devise a workable system for their particular situations. Thorough project documentation needs to be a part of standard operating procedure. It should be remembered, however, that while records normally kept and used for running a business are usually
permitted as evidence, records prepared solely for courtroom use, such as personal diaries or recollections of facts, will not be allowed.

While pre-planning, assessment and thorough documentation are essential, they are of diminished value to the architect who has neglected to trouble-shoot, especially when he has just received a call from a plaintiff's attorney. There are various defenses a design professional may try in order to shield himself from liability. Of course, the relative success of these tactics will depend on the specifics of the case and possibly on the astuteness of the defense attorney.

6.3 Defenses

As mentioned, establishment of a "duty" is essential for a plaintiff to have a cause of action against an architect for negligence. If no such duty exists, liability for negligence becomes non-existent.

Privity, or being in a contractual relationship with another party, can sometimes be used as a defense. Some jurisdictions require that parties be contractually bound before a claimant is given legal standing to seek damages. As a result, architects in these jurisdictions are shielded from liability to third-parties by invoking the defense of privity.

Other defenses for negligence are contributory negligence and assumption of risk. Under the rule of contributory negligence, a
plaintiff may be barred from seeking damages if his own negligence caused or contributed to the injury or loss. Currently, most states have replaced contributory negligence with comparative negligence. Comparative negligence is essentially the same as contributory negligence—the plaintiff's negligent behavior is assessed relative to the ensuing loss, but damages are awarded on the basis of this assessment. For example, if a plaintiff in a tort action alleges damages of $100, but is found to have negligently contributed to 50% of the loss, he will only be awarded $70.

Assumption of risk is recognized as a defense when it can be shown the plaintiff was made aware of the potential risk(s), but voluntarily submitted himself to it. An example of this could be when an engineer designing a swimming pool for a client hears of a new material for plastering pools. He describes this material to the client warning it may not be suitable for that locality because of temperature extremes. If the client agrees to the new material being used and the pool later cracks, the client may not have the necessary standing to sue the designer because he assumed the risk of trying a novel project.

In any type of legal action the claimant has a specified period of time in which a complaint may be filed. Failure to assert a claim within the specified time eliminates the claimant's cause of action despite the merits of the claim. These time periods, called statutes of limitation, are set forth in state statutes and, therefore, vary from place to place. Typical periods are: two years for a claim based on personal injury or
death, five years for property damage or an unwritten contract claim, and 10 years for breach of a written contract.\textsuperscript{55} Uncertainty often arises as to when the time period begins—especially when the defects or deficiencies are not discovered until a substantial amount of time has passed. Three possibilities are: 1) when the owner accepts the project, 2) when the owner discovers the defect, or 3) when the owner, with reasonable diligence, should have discovered the defect. In some instances, the clock begins ticking upon acceptance of the project, but in most situations limitation periods begin when the defect is discovered. To prevent an architect from being liable for a project an unreasonable amount of time, most states passed "statutes of repose" that simply bar any further rights of actions after a certain number of years.\textsuperscript{56} These statutes are subject to considerable variations from state to state—from four to 20 years. It should be noted that the statute of limitations is often longer for breach of contract than tort claims. Therefore, a client alleging malpractice against a design professional may wait too long to assert that claim, but may still be able to sue for contract breach.

6.4 Professional Liability Insurance

Perhaps the most common risk management tool known to design professionals is liability insurance. It is not mandatory for architects and engineers to carry insurance, but the risks associated with this
profession necessitate some kind of protection. The importance of liability insurance, or some other form of protection, cannot be stressed enough. A legal judgement against someone is enforceable by proceeding against their personal assets. These assets are used to satisfy any judgments made against the designers in court and may include bank accounts, stocks and bonds, jewelry, automobiles, and property. These would all be liquidated and applied to the amount of the judgement unless there is insurance coverage.

Most insurance policies are written on an annual basis, so the architect essentially "purchases" a new policy every twelve months. Liability insurance is usually written on a "claims made" coverage—that is, it only covers claims made against the architect during the time of policy is in effect and resulting from the work done by the architect during that time. As the designer renews his policy, services rendered in previous years of coverage will continue to be covered. If the insured, or the architect, changes companies, the new company can provide retroactive or "prior act" insurance for those earlier projects. This type of coverage may require a separate premium, and may have different upper and lower limits of coverage, though. "Extended" coverage may also be purchased to cover claims for periods of time after the main policy expires and is often used when an architect leaves active practice or retires.

Professional liability insurance covers the named insured—be it an individual, principles, or a firm. Insurance carried by a firm covers
all its employees performing professional services for the firm. Problems can arise if firms form a joint venture for a particular project. Each member can be held liable for malpractice claims made against another member acting within the scope of the business venture. To prevent this, it is best to carefully word the policy to exclude coverage for liability arising from someone else’s errors and omissions.

Liability insurance policies cover liability for performing normal professional services. These services are known to the carriers as well as the standards of care to which the architect will be held. The list is rather expansive regarding types of services not covered by insurance policies. For example, ordinary public liability, property damage, workman’s compensation or other employee claims and any non-professional business activities are excluded. Moreover, numerous professional services are also not covered, such as liability from express warranties, estimates of construction costs, acts of consultants, soil testing, and work done to tunnels, bridges, and dams exceeding 150 feet in length. Presently, the entire insurance industry has dropped coverage for any pollution related work. Consequently, this decision affects professionals involved in the cleanup of hazardous wastes, designers of sewage treatment plants, HVAC systems, and engineers who develop new substances containing toxic properties.

Many factors determine the amount of the insured’s premiums. Insurance companies look at an architect’s billing volume, the project types (e.g. residential versus hospitals), and the geographic location.
Additional factors affecting the premiums include the individual's insurance record and the types of services offered by the architect. For example, a full service A/E firm will incur much higher premiums than one providing only architectural services.

Architects and engineers erroneously believe the extent of their liability coverage should reflect the full value of their projects. This approach, however, would not only be unwise and unrealistic, but grossly expensive. The amount of coverage should be appropriate for the type of practice involved and the architect's gross revenues. Burton W. Thomas, AIA, states in an articles published in "Architectural Technology" that it is "a rule of thumb to have coverage which is not less than your gross annual billings..." The vast majority of architecture firms do not carry coverage of more than $250,000, and it is not at all unreasonable for a small firm to carry only $100,000 or so during their first few years of practice while gross billings are relatively low. The Architect's Liability Committee of the AIA periodically surveys all major insurance carriers to keep designers informed of trends and possible pitfalls in the industry. The results of the survey published in a 1988 AIA Memo report a variety of insurance options available to design professionals. Comparisons were made regarding four factors: 1) minimum premium, 2) minimum deductible, 3) minimum limit of liability, and 4) maximum limit of liability. The results show CNA/Schinnerer offers a minimum premium of $1,000, a minimum deductible of $2,000, and a range of coverage of $100,000 to $15,000,000. Shand Morahan reports a minimum
premium of $4,000 with a minimum deductible of $ 5,000 and a range of coverage of $100,000 to $ 3,000,000. Reliance, on the other hand, offers minimum premiums and deductibles of $20,000 and $10,000 respectively, with a range of coverage from $100,000 to $10,000,000.60 This is by no means exhaustive—there several insurance carriers offering various types of coverage.

Perhaps of equal, if not greater, importance than the amount of coverage an architect carries is the carrier itself. Critical to the selection of a carrier should be how they respond in the event of a claim—claims handling ability and procedures are as important as the price. Just as various factors affect premium rates, certain factors should be considered when selecting an insurance carrier. Burton W. Thomas, AIA, lists several in his article previously cited such as:

1) How promptly and in what way does the carrier respond when a claim is reported?

2) Do those who will handle the claim have direct experience in architect's professional liability?

3) How are defense lawyers selected and what are their qualifications in architectural liability cases?61

Choosing a carrier is not easy, but may well be an architect's most important decision. The A.M. Best Company of New Jersey prepares a rating scale to help in this endeavor. Though not geared solely toward the insurance industry, Best provides financial summaries of all major insurance companies.
Additionally, information may be obtained from a state's insurance commission. They have information on companies which operate on an "admitted basis"—that is, they furnish information regarding their products and financial stability.

The material in this thesis has discussed basic theories of tort law and negligence and how these subjects affect professional liability. Five case histories were examined to illustrate current legal trends, and how court decisions may very relative to the issue of architectural liability. A review of risk management offered oft-cited techniques used by architects to mitigate the extent of their professional liability. This treatise now concludes with observations regarding the implications of tort liability on the practice of architecture, and suggestions for the mitigation of this liability.
Chapter 7: Implications of Tort Liability for Professional Practice

7.1 Introduction

Individuals enter professions for many reasons and although they might have different priorities, they usually have a common objective of earning a living. It can be said that people earn money either by working for basic wages with no liability, such as grocery clerks, or by taking substantial risks, as do professional gamblers. Most professions or occupations involve varying degrees of both "risk taking" and "wage earning" activities, and architecture is no exception. In architecture, the professional liability resulting from either the risk taking or wage earning activities can be strongly influenced by external factors such as statutory regulations or legal trends as well as internal factors such as the architect's methods of risk management.

This thesis investigates the professional liability of architects and the impact of trends in tort law upon that liability. The past 25 years have brought many changes to the design and construction industries—particularly a tremendous increase in lawsuits against designers. The architect is not only responsible to the parties with whom he is contractually bound, but courts are now finding that he also owes duties to assorted third parties. It appears that the increased exposure to legal claims has been most impacted by the breakdown of privity requirements and the expansion of perceived duties owed to others.
by the architect. Additionally, risk management techniques have not been adequately modified or utilized by architects when addressing the issue of liability.

7.2 External Determinants of Liability

A design professional's liability may be influenced by factors not necessarily within the architect's control. As such, it may become necessary for design professionals to lobby for reformation of these factors which often leave the architect exposed to liability. These external determinants of liability include provity requirements, statutes of repose, worker's compensation, and insurance policies.

7.2.1 Privity

Architectural liability can be profoundly affected by factors not necessarily within the designer's control such as statutory regulations. The concept of privity is but one example of an "external" factor that frequently determines the extent of culpability owed by architects to others, especially third parties.

Entering into a contractual relationship, or being in privity with someone used to protect design professionals from third party claims. Parties were barred from asserting claims for losses unless they were one of the legal contracting parties. This requirement, however, has
suffered a steady erosion to the point of being non-existent. The decline of privity began with personal injury claims, extended to those pertaining to property damage, and now affects claims of economic loss in most jurisdictions. Courts reasoned that if an individual could demonstrate a tangible cause and effect relationship between his damages and the actions of the professional, the professional should be held accountable for those damages.

One of the earlier court decisions regarding liability for economic losses was United States for the Use of Los Angeles Testing Laboratory v. Rogers & Rogers which was decided in 1958. In this case, the contractor claimed the architect had been negligent in his interpretation of certain concrete tests. This faulty interpretation resulted in the installation of inadequate structural formwork. Because the formwork was deficient, it had to be removed and replaced, causing substantial work delays and increased costs. The court stated in its decision:

\[\text{The California courts no longer follow the old common law rules that privity of contract must exist in order for negligent performance of a contractual duty to give rise to liability for damage to an intangible economic interest.}\]

This issue of liability for economic loss is, and will continue to be of significant importance in the field of construction law. Design professionals will have to contend with the fact the economic loss doctrines are embedded in Tort Claims Acts which vary from state to state. The prudent architect should understand the rules pertaining to economic losses and privity requirements in the state of his professional
practice. While the decline of the privity requirement is resultant of a desire to balance power and compensate victims of negligent acts, it should not become a mechanism for easy access to litigation in pursuit of frivolous claims. If necessary, legislatures should be called upon to revamp their statutes pertaining to recovery in tort actions. This author believes a conservative drafting of an economic loss doctrine is better than an overly permissive one. Recovery in tort for pure economic losses should be allowed, but only if the third party, by the nature of its work, is required to rely on information supplied by the professional and this reliance results in financial damages to the third party. This statutory reform would not only affect architects, but would affect engineers, landscape architects, and surveyors. Additionally, such professionals as investors, financial analysts, accountants or consultants may be implicated as in the case of White v. Guarante in which an accountant, who was retained to prepare financial statements for a limited partnership, was found to be liable to the partners as individuals when his negligent actions caused economic losses.64 Statutes pertaining to recovery for only economic losses should consider the scope of the duties performed by the professional for another, and whether or not misfeasance of those duties proximately caused the damages. The foundation of tort law is to compensate victims of a loss caused by the improper actions of another. As such, privity requirements should be modified to allow recovery for financial loss, but only within well defined boundaries. This would not only protect potential victims,
but could serve as incentive to those in the practice of supplying necessary information to substantiate the adequacy of the information. It should be remembered that despite a state’s privity requirements, most design professionals will still be liable to third parties for personal injuries and property damage as long as the claimant can demonstrate the existence of a duty and the other elements of negligence by the preponderance of the evidence.

7.1.2 Statutes of Repose

Research by the Victor O. Schinnerer & Co. and CNA Insurance Companies reveals that of all claims asserted against architects, 78% were for property damage while personal injuries accounted for 22%. Of the personal injury claims, half were filed by construction workers with third parties filing the remainder. Personal injury claims account for relatively few claims against architects, but can result in costly pay-outs to the injured party. As mentioned, design professionals can sometimes use statutes of limitations or repose as a defense to personal injury suits. However, since these statutes can vary in length from four to 20 years, the architect may find himself exposed to liability for great periods of time. Data from the Schinnerer and CNA research indicate that 90% of the personal injury claims are filed within six years of substantial completion of the project. From this, it would appear that a reasonable statute of repose would be six years and would
be most fair to all the parties in the construction process.

Statutes of repose typically insulate architects, engineers, contractors and any others participating in the design, planning, supervision or construction of a project from liability after a certain amount of time has passed. These statutes have been challenged as being unconstitutional, though. Several claims have been filed alleging a state's statute of repose arbitrarily protects architects, engineers, and contractors, but does not extend to manufacturers of building parts or to the owners of the facility when the injury occurs. These differences are alleged to be violative of the Equal Protection Clause of the 14th Amendment of the United States Constitution. In Mullis v. Southern Company Services, Inc. the court entertained this very issue and held that there are valid distinctions to be made between design and construction professionals and subsequent owners or tenants of a property. The court concluded that after a property is conveyed to an owner, "...there exists the possibility of neglect, abuse, poor maintenance, mishandling, improper modifications, or unskilled repair...by the owner."67 Moreover, architects and contractors do not ordinarily have access to the property following the owner's acceptance so as to guard against or prevent such neglect. For those reasons the courts supported the legislative distinctions made between design and construction professionals and the owner of a project. When considering suppliers or manufacturers of construction components, the court felt that since they produce standard goods and develop standard processes
within an environment of high quality control they should not be afforded the same protection as architects et al. Thus, the distinctions the state of Georgia made between design professionals and suppliers or owners have reasonable bases and were not found to be arbitrary or violative of the 14th Amendment.

Statutes of repose should be enacted by legislatures as a means of providing some degree of finality to a construction project and encouraging property owners to maintain safe structures as required by law, in addition to protecting the welfare of the citizens. They should not, however, be used to unnecessarily burden design professionals with unfair periods of liability for projects. For these reasons, states with inexcusably long statutes of response (i.e. longer than six or seven years) should be encouraged to modify or revamp those statutes.

7.2.3 Worker's Compensation

Worker's Compensation is another example of an external factor influencing an architect's professional liability. Personal injury claims by construction workers account for one-half of all such claims. Although employers are covered under such statutes, architects and engineers are usually the only parties to the construction process not covered by worker's compensation laws which leaves them exposed to various suits by injured workers. Claims against architects by these injured workers can take years to resolve because of extremely crowded
court calendars. Moreover, these claims are typically decided in the architect's favor because he is usually not responsible for the safety of construction workers, and courts have also determined that design defects do not typically result in injuries. The final resolution of such a claim does not come cheaply either. A designer will often have to spend thousands of dollars in legal fees to be vindicated in a lawsuit. This problem could be avoided if architects and engineers were included under worker's compensation. To date, only three states have taken this step—Kansas, Oklahoma, and Connecticut. The remaining 47 should be encouraged to follow suit.

7.2.4 Insurance Policy Restructuring

With personal injury claims accounting for a small, but significant number of suits against architects, a final factor meriting discussion is that of the liability insurance industry. As mentioned, most insurance companies offer "claims made," "prior acts," and "extended coverage," but these options may not have the capability to adequately address current liability issues. Insurance policies available to architects could require restructuring. One suggestion is for companies to offer a type of "no fault" policy to owners upon project completion. This policy would cover all the parties involved in a building's design and construction. It would basically state that none of the parties were liable for the injury. This would eliminate the need for plaintiffs to
prove which actions of which party caused the injury; the plaintiff would only have to demonstrate that because of some negligent flaw in the building he was injured and suffered damages. Consequently, legal costs would shrink, resolution would come sooner, and the injured party would be compensated in a timely manner.

7.3 Internal Determinants of Liability

Professional liability is also clearly determined by the acts of the architect. Responsibility often begins and ends with what the individual does or does not do. As a result, liability can be mitigated by the improvement of project quality control methods, careful delineation of the architect's responsibilities, and concise contract language.

7.3.1 Contracts and the Architect's Responsibilities

Risk management should begin with careful delineation of an architect's responsibilities to an owner and to others involved in the construction process. For too long, architects have tried to be all things to all people. This assumption of various roles, however, has only resulted in tremendous exposure to liability. A significant number of claims against designers are initiated by owners who very often have little or no experience in the design and construction industries. The Schinnerer and CNA research shows that not only are 78% of the claims
against architects for property damage, but close to 80% of those claims pertain to design services while 17% relate to construction administration. Because of the owner's inexperience in construction, they frequently enter business relationships with completely unrealistic expectations or goals. This can end in perceived shortcomings by the architect for which the owner will attempt to remedy by litigation. A large number of owner-architect disputes seem to be based on miscommunication rather than a breach of the professional standard of care. The AIA strives to develop standard contract forms which clearly and unambiguously define the responsibilities of each party. These contracts, when used in good faith, are generally quite fair to each party. Moreover, contracts often provide the architect with the best opportunity to avoid or retain certain risks before work is begun. A good contract, though, will not ward off lawsuits by itself; a thorough understanding of each provision is extremely important and necessary for a successful working relationship. Toward this end, this author suggests that architects assume the responsibility of carefully discussing the contract with the owner prior to its signing. The design and construction process should be thoroughly explained as a means of avoiding misconceptions and identifying common pitfalls within the industry. Each contract provision should be examined to reiterate what should and should not be reasonably expected of the architect. Moreover, the architect should make every attempt to clearly understand and document the owner's expectations. This process of "client education"
would not be unlike a surgeon explaining elective surgery to a patient—the facts, advantages, disadvantages, and projected outcomes are presented from which the patient then makes a decision. Informed consent is a common practice in professions such as medicine and should become as common in architecture. While such an undertaking may seem very time consuming and would undoubtedly result in higher expenses to the owner, the owner may become more willing to pay for these services when it is pointed out that litigation costs much more, and less than 25% of the claims against architects by owners result in pay-outs.\textsuperscript{69} It would also seem that the more informed contracting parties are regarding the roles and duties of others, the chances for misunderstandings decreases substantially, as well as the likelihood for litigation.

7.3.2 Quality Control

The architect should develop strategies or methods to ascertain that there are no errors or omissions in their work once a project is underway. Guidelines and procedures should be established for use on each project. Many professionals find standard printed forms for all documentation and communication very useful for project record keeping. Standard printed forms should provide a uniform format for entering pertinent information such as the date, project title, project manager, source of information (e.g. telephone conversations or client conferences etc.), future recipients of information, and a synopsis of
necessary information. It is extremely important that all forms include required information, distribution, limitations/qualifications or disclaimers of responsibility. Each architect will require different quality control measures which best address his needs, but some important items include:

1. Work to be done by persons other than the architect should be those individuals who have the experience, skill, and competence to do the job properly. If project teams are formed, a project manager should be selected to have final authority over and responsibility for the work done by the team.

2. Written project programs should be prepared setting forth all the requirements, limitations, and restrictions pertaining to the design and construction of the project.

3. Time schedules and budget allocations should be set up for each phase of the project and these phases must be continuously monitored to control and correct any problems.

4. Checking procedures should be employed to verify the accuracy and completeness of any calculations, drawings, or specifications. Checklists are extremely helpful in determining that work is complete and all conditions have been met, and

5. After a project is completed, an evaluation of the work done provides an opportunity to review any problems encountered and to develop improved methods of handling such problems in the future.

Quality control techniques only require thoughtful planning and commitment by the design professional to follow the procedure on each project. It is an on-going risk management tool that allows problems to be resolved before growing astronomically and allows for the development of improved problem resolution. Quality control is most effective when
initiated and maintained through a project's life—it cannot be done retroactively.
Chapter 8: Conclusion

Architectural liability in professional practice may be best mitigated by three approaches:

(1) Avoidance of risks

(2) Transferral of risks

(3) Insure against risk

Issues of liability can be lessened by simply avoiding certain risks. Projects involving novel construction methods or new materials for example, may be best left alone by those with little experience. It may also be more prudent for an architect to be wary of certain owners—especially those who refuse to use industry standard contract forms and who insist on drafting their own contracts which contain extreme or absolute wording such as "all," "every," or "never." Rejection of questionable or high risk projects may not seem much of an option to those architects who need work, but it should be remembered that choosing to undertake high risk work requires meticulous quality control and risk management measures.

It can be said that risk is best managed by shifting the risks to the party who is most capable of controlling and minimizing them. The architect should never assume or undertake more responsibility than expected according to professional standards. Moreover, architects should consider avoiding any joint responsibilities on a project. Having one person charged with overseeing and having primary responsibility for
a project lessens the chance for misunderstandings and disputes. It is also good practice for architects to let those parties who have decision making authority make their own decisions. Designers may suggest alternatives, recommendations, or offer professional opinions, but should not actually make the decision.

Potential risks may also be insured. This insurance may not necessarily mean professional liability insurance policies, but may include thorough quality control or risk management techniques. As mentioned, careful project documentation is frequently critical to the outcome of a dispute. All records normally kept for business purposes should be maintained throughout the life of a project and through that state's period of repose. This author believes that designers should make every effort to maintain records of a project's contract documents (including any bid information, change orders, cost estimates, and shop drawings), test results or measurements, letters, telephone memos or other communications, notices pertaining to additional work or costs, and documents regarding additional services by the architect. Additionally, discrepancies in communications or discussions should be clarified or resolved immediately in writing. Quality control measures should be initiated, maintained, and updated periodically to assure the architect of maximum risk prevention.

In summary, it is clear that the practice of architecture has and will continue to be affected by issues in tort law. The issue of liability is understandably a valid concern to design professionals, but
the problems encountered by architects will not and cannot be changed overnight. Increased exposure to liability, especially to third parties, should influence how an architect conducts his business; designers should begin to "screen" possible projects relative to their risk factors, spend more time documenting and maintaining project records, and should invest time in educating clients about the design and construction industries. Basically, architects need to clearly define the scope of their services - what is to be done, why it is to be done, and when it will be done. For now, architects need to devote their energy to improving methods of quality control and to lobbying for reformations in the insurance industry and state legislatures. Attacking these "internal" and "external" determinants of liability may be the best approach to reducing the threat of liability and lawsuits. Finally, if all else fails, the architect needs to retain a good attorney - preferably one well versed in the nuances of the construction industry.
Literature Cited


3  Streeter, p. 4

4  Streeter, p. 4

5  Dr. Jerry L. Householder, Lecture to Professional Practice Class (Arch 4044), November 27, 1989.


8  Sweet, p. 101.

9  Prosser, p. 6.

10  Prosser, p. 6.


12  Prosser, pp. 21-23.


14  Prosser, pp. 164-165.

15  Prosser, pp. 358-359.

16  Prosser, p. 185.


18  Weill Construction Co. v. Thibodeaux 491 So. 2d. 166.

Sweet, p. 326.

Sweet, p. 328.


Aetna Insurance Co. v. Hellmuth, Obata, & Kassabaum, Inc. 392 F. 2d 472 (8th Cir. 1968).

Jaeger v. Henningson, Durham, & Richardson, Inc. 714 F. 2d. 773 (8th Cir. 1983).


Franklin, p. 4.

Streeter, p. 52.

Sweet, p. 363.

Streeter, p. 11.

Streeter, p. 11.

Streeter, p. 11.


Currie, p. 179

Sweet p. 365.

Simon, p. 142.


41 Syhoffner Industries Inc. v. W.B. Lloyd Construction Co. 257 S.E. 2d. 50 (N.C. App. 1979).

42 Simon, p. 37.

43 For example, the State of Virginia still requires privity to exist to receive damages for economic loss absent personal injury or property damage. See section 8.01-223 of Virginia Annotated Code.

44 Cushman, p. 8.

45 Prosser, p. 509.

46 Simon, p. 139.

47 Streeter, p. 32

48 Cushman, p. 8.


50 Franklin, p. 9.

51 AIA Document B141, section 4.3.

52 Franklin, p. 10.

53 Simon, p. 425.

54 Simon, pp. 425-431.

55 Streeter, p. 15.

56 Streeter, p. 15.

57 Streeter, p. 64.

58 Streeter, p. 64.


61 Thomas, pp. 5-6.


64 White v. Guarente, 372 N.E. 2d. 315

65 Abramowitz, p. 3.

66 Abramowitz, p. 6.

67 Mullis v. Southern Company Services, Inc., 296 S.E. 2d. 579 at p. 582.

68 Abramowitz, p. 4.

69 Streeter, p. 4.

70 Wright, Robinson, McCammon, Osthimer & Tatum, from "Pre-Award Phase Claims Avoidance" (Richmond, VA) p. 2.
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